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NO. 79-1176

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

CITY OF MEMPHIS, WYETH CHANDLER, THE COUNCIL OF THE CITY OF MEMPHIS, AND EDWIN McBRAYER

Petitioners,

VS.

N.T. GREENE, ELNORA PRIEST CROSS, EDWIN OWENS, AND CAROLYN BURSE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT GREENE

ALVIN O. CHAMBLISS, JR.
3322 South Lamar Blvd.
Oxford, MS 38655
(601) 234-2918

Counsel for Respondent N.T. Greene

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Whether a municipality's action in closing to through traffic a major street, through an all-white community, which provides the sole direct pedestrian and vehicular access to a public park and public schools from a predominantly Black community, constitutes a violation of 42 U.S.C. § 1982 and the Thirteenth Amendment of the United States Constitution, when the municipality's action in closing the street had a racially disproportionate adverse impact on Black property owners and affected them psychologically when the closing

benefited whites and was not done pursuant to a city-wide plan and the procedure used was irrational and arbitrary.

2. Whether this Court should give a broad interpretation to 42 U.S.C. 1982 and the Thirteenth Amendment in determining what are "badges and incidents of slavery" when the legislative intent of the Congress was to give practical meaning to emancipation and the scope of 1982 is limited.

3. This Court should affirm the opinion of the Appellate Court and not reach the issue of intent or purpose since the constitutional question is not necessary for the disposition of the exact issue before this Court.

COUNTER-STATEMENT OF THE FACTS

In their statement of the case, Petitioners have supplanted the true facts in this record with a wholly one-sided presentation and have omitted important facts which will aid this Court in reviewing this case properly. Respondent Greene, accordingly, presents this counter-statement of the facts.

Hein Park is an all-white subdivision located in the heart of Memphis, Tennessee. It was developed well before World War II as an exclusive residential neighborhood for white citizens and those characteristics have been maintained. To the west of Hein Park is the sizeable and handsomely landscaped Southwestern College campus; the southern boundary of Hein Park is a boulevard which is the northern boundary for *a large park and zoo*, (emphasis added) the eastern boundary is a large crosstown thoroughfare, which also contains residences; and the northern boundary is Jackson Avenue which carries considerable traffic, much of which is commercial in nature.

The street involved in this litigation is known as West Drive. It extends the complete length of the subdivision,

which is about one-half mile. Opposite West Drive on the north side of Jackson Avenue is a major thoroughfare, Springdale Street, which serves a sizeable area composed of Black citizens. These are primarily the persons who will be inconvenienced by the so-called closing of West Drive. (A. 148).

There were five years of study and planning put into the closing of West Drive by its all-white residents of Hein Park. (A. 10).

Mr. Robert Fosnaugh, the traffic engineer, had reservations concerning an earlier comprehensive plan of the Hein Park residents to close several north-south streets to the subdivision. Apparently, he changed his mind when they agreed on a plan more to his liking. Mr. Fosnaugh advised that "from a practical standpoint — it appears that merely closing West Drive at Jackson would eliminate a major portion of the through traffic using subdivision streets; thereby, achieving most of the original objectives of the proposal." (A. 152). It should be noted that the District Court stated, "I don't think it is going to stand or fall except it is another indication that somebody decided they were going to accomplish, partially accomplish what they hadn't been able to do in three years, the Hein Park Civic Club. They tried to keep all of the people north of Jackson Avenue from coming through there and that didn't work. So, now somebody, I don't know who it was, has come up with this clever idea that if we can get the two people on the corner to - I would be interested to know who is going to pay the eight hundred dollars (the agreed price of the 25-foot strip across West Drive). If we can get those two people to agree and lend us their names, we can stop these people to the north. The people from the north were predominently Black people. (A. 174)."

Bill C. Weber, M.D., advised the Planning Commission that in August 1970, a petition to close several streets in

Hein Park was submitted to the City of Memphis Traffic Engineering Department but this proposal was rejected.

Based upon the information given Dr. Weber by City Engineer Robert A. Fosnaugh, that recommendation and advise was accepted and put into the July 9, 1973 application. Dr. Weber stated that the Hein Park Civic Association had discussed this matter with designated agencies, representatives and their comments concerning the closure were noted. (A. 132-145).

On July 9, 1973, a formal application was filed with the Memphis and Shelby County Planning Commission by members of the Hein Park Civic Association for the closing of a portion of a public residential street known as West Drive. The application states that the reasons for the requested closure are to:

1. Reduce flow of through traffic using subdivision streets,
2. Increase safety to the many children who live in the subdivision and those who use the subdivision to walk to Snowden Junior High School,
3. Reduce "traffic pollution" in a residential area, e.g., noise, litter, interruption (sic) of community living. (A. 135; Trial Exhibit Transcript, pp. 19, 148).

Upon receipt of the application, the Planning Commission staff communicated with various departments of City government in an attempt to discern their feelings regarding the closure. One of the senior planners who worked on this application (Pauline B. Temple, Deputy Comptroller Council Records) was a patient of the prime mover behind the closing of the street. (Dr. Bill C. Weber, Street Project Chairman) and yet this employee did not disqualify himself (sic) from processing this petition. (A. 102, 126-128; Tr. Ex. 1 & 2; A. 130-131; Tr. Ex. 4; A. 132-145; Tr. Ex. 13).

After receiving information from the various City departments, the Memphis and Shelby County Planning Commission recommended at its November 1, 1973, regu-

lar meeting that the closure of West Drive at Jackson Avenue be approved as submitted, with conditions relating to the providing of utility facilities and fire department clearance requirements. (A. 130, Pet. Br. 8).

Mr. Paul Goldstein, a planning assistant with the Planning Commission, testified that it was his responsibility to accept and process applications for street and alley closings. His duties included communicating with the various departments of City government concerning their views on the proposed street or alley closing and making a field study of the area under scrutiny. (A. 156). The Planning Commission on November 1, 1973, approved the closing of West Drive and the matter did not come on for hearing before the Memphis City Council until January 29, 1974. Affected area residents were not given any notice of the closure recommendation nor were they included in Mr. Goldstein's survey of the area under scrutiny, the exception being the all-white residents of Hein Park. (A. 8-10; A. 103-105) (Tr.). Even though the Black residents north of West Drive were not given notice as to the proceedings, a white resident of West Drive, Ms. Sarah Terry, objected to the closing and stated that the "person who was passing out the petition wanted to eliminate "undesirable traffic"." (A. 114-115; Tr. 140).

Nevertheless, the matter came on for hearing before the City Council of the City of Memphis, Tennessee, on January 29, 1974. After presentation of the proposal by Mr. Robert Miller, speaking on behalf of the Planning Commission, four persons speaking in favor of a resolution to close a portion of West Drive were heard. Seven persons spoke in opposition to the street closing. Each side was given fifteen minutes to present its views, though the Hein Park group had been working with the City and independently on proposals to close the street for five years, notwithstanding. (A. 10, 132; 174; Tr. Ex. 26; Tr. 19).

It was alleged in the record by Respondent Green that approximately 50 people who live north of Jackson Avenue attended the council meeting. Nevertheless, the council allowed equal time to both groups (15 minutes per side) (A. 9).

The record reveals that the following comments were made by persons who opposed the closing of West Drive. In summary:

(a) *Mrs. Sarah Terry*, (a white resident of West Drive) said she used the Jackson Avenue - West Drive entrance "daily", and was told by a member of the Planning Commission staff, that they had to have 100% approval by the residents of West Drive. She feels West Drive is a public street and the residents could not "dictate" who may or may not use the street. That West Drive is definitely a convenient road for people coming south on Springdale. That West Drive is the only through street between University and Trezevant. That as far as safety of children is concerned, that is the responsibility of parents. That to close West Drive would simply re-route other traffic from within Hein Park to that of another street within Hein Park.

(b) *Mrs. Vicki Vincent* (white, of the Vollintine-Evergreen Community Action Association) stated there were two residents, who live on West Drive, who opposed the closing (the Terry family and the Thomas family). She said speed breakers would be a deterrent to through traffic and sidewalks could provide safety for children and elderly residents. That to close the street would set a "dangerous precedent". That when this matter was initially brought before the Planning Commission (4th day of October, 1973), it was rejected. That if West Drive was closed the VECAA fears the Council will be opening up a "giant can of worms". That citizens from Red Acres to Parkway Village, from Chickasaw Gardens to Central Gardens will want the same thing. That people all over the City will want the same thing.

(c) *Mr. Calvin Woods, Jr.* (a Black resident of East Drive) stated West Drive is a public street built and maintained by all of your tax money. That the residents of West Drive should be made to build public sidewalks just as he was made to do in the front of his house.

(d) *Mr. Emanual Goldberger* (a white resident of Barbara Drive) said he was against the closing because it is the only place that has a traffic light that leads us out of our part, north of Jackson between Springdale and Hollywood. That the children on East Drive, Trezevant, and Barbara Drive are just as dear to their parents as the children in Hein Park. That the Council should build a park in the area for the children to play in.

(e) *Mr. Henry Jackson* (a Black, representing Shankman Hill Civic Group) stated he and others paid a great deal of taxes. That the "speed breakers" will cause mass confusion with the intersection (some cars trying to make turns and others going through Hein Park). He remarked, "I believe that the law applies to everybody equal." There would be no accidents if sidewalks were put in.

(f) *Rev. Cummings* (a Black resident of Springdale and Alameda) stated if a sidewalk was needed on West Drive, then the Council should authorize it, but not close West Drive.

(g) *Plaintiff-Respondent Greene* (Black) stated Hein Park residents had continuously, since the 1940's, "waived the law", in so far as public sidewalks are required in residential areas, for their own benefit. That now the Hein Park residents want West Drive closed. That taxpayers' money build and maintained West Drive all these years, and taxpayers' money will continue to maintain West Drive. That he had talked to State Rep. Doyle Daniels, who opposed the closing of West Drive. That to close West Drive will set a dangerous precedent.

(A. 12-14).

Alternatives to the West Drive closing were discussed by the Council members. Some thought that the problem was one simply of traffic and speed and that speed breakers were the only thing necessary. Councilman Ford (Black) pointed out that speed breakers could not be located on a "dedicated street" and could only be put on private property. Mr. Ford further recommended a speed of 20 m.p.h. and radar units to patrol the neighborhood.

Councilman Allissandratos (white) stated, we have closed alleys in the past, but that West Drive is not an "alley". He had information that the Police Department thought the closing could cause disruption of police services in the area.

Mr. Clay Hiddleston (Chief Administrative Officer of the Mayor's Office) testified 820 cars passed through West Drive in a 12-hour period. Councilman James (white Hein Park District) suggested a compromise by putting a 15-mile speed limit on West Drive. Mr. Woods (a Black resident of the area) spoke up and said that he was going to tell it like it is, "They don't want the Black people in there no way. That's the way it is." Mr. Woods further said, "I doubt if a hundred cars go through there during the day between 7:00 or 6:30 till 9:00. There may be that many cars, maybe 200." The Council then voted on the resolution, 8-3 in favor, thereof. (A. 14-15, 126; Tr. Ex. 1 & 2; Tr. 19).

Later Councilman Bob James informed Plaintiff on the 30th day of January, 1974, that Councilman Allissandratos would ask the whole Council to reconsider the closing of West Drive at its next meeting on February 5, 1974. Chairman McBrayer (white) of the Council would not allow further discussion by Respondent Greene and members of his class stating that their rights to a "public hearing" had already been fulfilled. The Council refused to accept 742 signatures on petitions against the resolution authorizing the closing of West Drive. On the reconsideration motion, the vote was 7 for and 5 against. (A. 15-16).

Councilman Ford attempted to put a new resolution on the agenda to reopen West Drive on February 26, 1974 and on March 5, 1974 but the former session did not take place and the latter attempt was defeated on a 6 to 4 vote. (A. 16).

On the printed fact of the application, it is provided that "all owners abutting the thoroughfare to be closed must sign the application." The back of the application lists the procedure for filing street or alley closing and includes this same requirement. All of the owners on West Drive whose property physically touches West Drive did not sign the application. (A. 149-150). Mrs. Terry stated that a member of the Planning Commission staff told her that 100% approval by the residents of West Drive was needed for closure. (A. 12).

Mr. Miller, of the Planning Commission, stated, "I interpret abutting to be immediate adjacent to the land that we are going to close. The portion of the street that we are going to close." (A. 118).

Mr. Goldstein, a planning assistant, claimed that a document entitled "West Drive Street Closure" contained in the file, was not an official document of the Planning Commission. The document states in part on Page 2 No. 4, "As required of the official application form all abutting and affected property owners must sign request for street closure." The words "abutting and affected" are hand-written above and the typewritten word "affected" which has been crossed out. (A. 156).

In two cases, one involving Benton Street and the other involving a portion of Ruth Street, the Planning Commission received requests to close streets which had been dedicated to the City, but had never been opened for traffic. The applications, made in 1968 and 1972, respectively, contains the signatures of all persons who abut along the portions of streets which are to be closed. In both cases this portion includes the entire street between two intersecting streets. The areas involved are Black neighborhoods. (A. 158).

Respondent Greene and intervenors were credited with the provision of other facts that the District Court found as recited by the Court of Appeals:

> The proof shows that this is the only time that the street and alley closing procedure has been used to close a street which serves as a thoroughfare for the residents and the public. From the standpoint that the closing procedure has been used to close alleys and dedicated but unused streets, the proof shows that the procedure has benefited Black citizens as well as white citizens.

The court, however, did hold that the proposed closing had a disproportionate impact upon the Black citizens, but that the disparate impact was not so stark that a discriminatory motive could be inferred therefrom. The court stated that

> the closure of West Drive in the manner adopted by the City Council will have disproportionate impact on certain Black citizens. However, the Court also concludes that there is not sufficient proof of racially discriminatory intent or purpose on the part of the city officials to establish a constitutional violation." (A. 171-172).

As heretofore indicated, by placing the narrow barrier at the intersection of West Drive and Jackson, the southbound, overwhelmingly, Black traffic will no longer be allowed to continue a logical and direct route across Jackson. At the same time the white residents of West Drive will have considerably less traffic. The residents of West Drive also will have less inconvenience because most of their movement will logically take them southbound on departure and northbound on return. (A. 172).

While ruling against the Plaintiffs, the district judge nonetheless entertained serious reservations concerning the wisdom of the proposed closing. His opinion further stated:

> "In the instant case, this federal court is of the opinion that it should refrain from applying its judgment on the merits even though the City Council opted for lessening

> the traffic problems for the white citizens of West Drive in spite of the adverse impact upon the Black citizens north of Hein Park, the aggravation of racial hostility with the attendent (sic) retribution and vandalism caused by the obvious rejection, a reduction of response time for the fire and police and inconvenience and delay to Sanitation Department employees."

The trial judge's observations were supported by the record. Besides the evidence previously described, included in the evidence before the court were the petitions circulated by the Shankman Hill Civic Club and signed by several hundred citizens residing immediately to the north of West Drive. Those petitions took note that "[t]his Closing symbolizes in unmistakable terms a White neighborhood shutting its door on its adjacent Black and integrated Communities." In a colloquy with counsel for the city, the trial judge indicated his concern:

> THE COURT: (Interjecting) There is proof that this is just an invitation to vandalism and to defiance and confrontation from the people. Obviously the Black people north of there who are being told to stay out of the subdivision.

Further showing his extreme skepticism at the proposed closing, the trial court observed:

> THE COURT: I don't think it is going to stand or fall except it is another indication that somebody decided they were going to accomplish, partially accomplish what they hadn't been able to do in three years; the Hein Park Civic Club. They tried to keep all of the people north of Jackson from coming through there and that didn't work. So, now somebody; I don't know who it was, has come up with this clever idea that if we can get the two people on the corner to—I would be interested to know who is going to pay the eight hundred dollars (the agreed price of the 25-foot strip across West

Drive). If we get those two people to agree and lend us their names, we can stop these people on the north.[1]

The trial judge also particularly noted in his opinion the testimony of Dr. Marvin Feit, an Assistant Professor at the University of Tennessee Center of Health Sciences, who testified as an expert witness that "closing West Drive would result in negative consequences in the form of hostility toward the people who live in Hein Park, increased vandalism, school harassment, and increased arrests by police."[2] The trial judge additionally relied in his findings

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[1]The following exchange also occurred:

THE COURT: I don't think that you can compare the closing of a part of an alley in an all black neighborhood to a situation where an all white neighborhood is seeking to stop the traffic from an overwhelmingly black neighborhood from coming through their street.

MR. SPEROS: Well, Your Honor, there has been no proof that it is an overwhelmingly black neighborhood to the north.

THE COURT: Have you been out there?

MR. SPEROS: I used to live out there.

THE COURT: Used to, you don't now?

MR. SPEROS: Well, Sir, I lived on Overton Park which is just south of there just —

THE COURT: (Interjecting) I'm talking about Springdale. Coming across there. You don't think that is predominently (sic) black?

MR. SPEROS: I am saying that there was no proof introduced to that effect, Your Honor. If you want to take judicial notice of it.

THE COURT: I will take judicial notice of the fact that this is one of the areas that — we use the word "predominently" (sic). I am sure that it is not all black. Predominently (sic) is kind of a delicate word. Hein Park is not predominently (sic) white, it is white.

So, if the City Council didn't know that that property coming up to Jackson Avenue was predominently (sic) black, then I have got my doubts about them.

No contrary claim has been made on appeal, nor did any party object to the judicial notice so taken.

[2]Dr. Feit further testified:

There are several things that I think could very easily happen. First, one of the most improtant things that I think will occur is an increase in

(continued)

(footnote continued from preceding page)
hostility directed towards the people in Hein Park. Acts of vandalism will most likely increase in the community where if people, children and teenagers know and perceive that the people in Hein Park are receiving something of a personal benefit that other people are not physically able to get.

A second consequence is going to be in school and which I think there very easily will be increased harassment (sic) on the part of the children in the community that attended Snowden School and maybe a couple of other places, to the extent that the school, and the street, which now has a reasonable degree of integration and a reasonable degree of harmony flowing between the two areas, will effectively be destroyed.

Q Which street are you talking about now?

A The harmony that exists between Hein Park and West Drive and the Vollentine area. That harmony will be effectively destroyed.

That barrier will not in any way decrease foot traffic. In fact, it may serve as a magnet to bring more people to that place. I think if you ever wanted to create a monument to increased hostility, you would do that and that would serve as a magnet to bring people to a street to demonstrate very clearly that that is evidence of people being able to get favoritism. And as a result, and I have seen this happen in many other cities, you do get an increase and a long-term increase of vandalism on the street and in the area, particularly in Hein Park.

Q So that you are not restricted - Well, let me ask the question this way. I think your testimony indicates that the hostility would be directed towards the residents of West Drive; is that correct?

A Very easily.

Q What, if anything, Dr. Feit, would this exertion of hostility have on the Black persons north of that area.

A Well, normally what happens is that people get on the telephone and call the Police Department. This is going to result in increased cost to the people of the City of Memphis because more policemen are going to have to come over there and investigate and as a result they will spend more time in the Black community. Obviously it is going to probably bring about an increase in arrests and harassment (sic) or more Black youths, not in any way helping the City of Memphis Police Department do its job dealing with crime. They will have to spend increasingly more time in the Black community to locate vandals as opposed to dealing with crime.

* * * * * * *

. . . I think that the barrier is going to serve as a monument to racial hostility because now more people have access between the Vollentine area and Hein Park.

upon the testimony of Plaintiff's witness, Harold Moore, a licensed real estate broker, to the effect that the proposed closing would be a real benefit to the residents on West Drive. It is significant, however, that while Moore opined in his original testimony that because of the closing "there would not be a lessening of value in those properties in the Springdale area", his testimony shortly thereafter modified that view considerably:

> In my opinion, with the 17 years experience in the real estate industry, psychologically it (the street closing), would have a deterring, depressing effect on those individuals who might live north of the Hein Park area. With the closure of the street, the creation of another little haven, the fact that these people are in a lower economic social group and wouldn't be able to actually afford housing with the illustrious price tags of those houses in the Hein park area, it would be, in my opinion, like the individual looking in the pastry store who doesn't have a dime and who can't afford it. And consequently, as a result of such, their moralistic values on their properties could tend to be such that the upkeep would not be nearly so great and it could have a detrimental effect on the property values in the future. (A. 173-176).

West Drive and the Hein Park residents do not have sidewalks in front of their property. (A. 14, 72-73).

A Black resident, Calvin Woods, Jr., of East Drive, stated that he was made to build a public sidewalk in front of his house. (A. 13).

West Drive leads almost directly to the only entrance to Overton Park on its north side. (A. 122, 154).

SUMMARY OF ARGUMENT

This Court is being asked to determine whether purposeful discrimination should be required to establish a violation of

42 U.S.C. § 1982 and the Thirteenth Amendment without regard to who the victims are, what the activity is or what fundamental or basic right is involved. This approach ignores the Reconstruction Congress' concern with securing for recently emancipated Blacks the status of citizenship and the basic rights appurtenant thereto.[3] This Court in *Runyon*

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[3]Heated Congressional debate occurred before the first sentence of the Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1966), was amended so as to declare explicitly and unequivocally that Negroes are citizens. One Senator voiced the opinion that the Thirteenth Amendment had removed "the only obstacle in the way of citizenship" and that they had thus become citizens automatically, although he acknowledged the difficulties presented for that argument by the Supreme Court's Dred Scott decision, *Scott v. Sandford,* 60 U.S. (19 How.) 393 (1956), in which the Court held that the framers had not intended broadly phrased constitutional provisions to include Negroes. *See* 36 CONG. BLOBE 506-07 (1866) (remarks of Sen. Johnson). But the vast majority of Congressmen assumed that Negroes were not citizens. *See, e.g., id.* 497-98 (remarks of Sen. Van Winkle). Furthermore, several legislators contended that Congress did not possess the power to make Negroes citizens ad that a specific constitutional amendment was necessary. *See, e.g., id.* 499 (remarks of Sen. Cowan) (the Thirteenth Amendment empowered Congress to legislate only to enforce the liberation of the slaves and no more); *id.* 523-24 (remarks of Sen. Davis) (the congressional power to make persons citizens by naturalization applies only to persons formerly foreigners who renounce allegiance to a foreign power; it does not apply to non-citizens who have no prior foreign allegiance).

The very basic nature of S.61, 39th Cong., 1st Sess. (1866), the bill that became the 1866 Act, is illustrated by the comments of the bill's sponsor, Senator Trumbull, and its most outspoken opponent, Senator Davis. Senator Trumbull characterized the bill as "the most important measure . . . since the . . . constitutional amendment abolishing slavery." He stated that

> this measure is intended to give effect to that declaration and secure to all persons within the United States practical freedom. There is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect . . . . Of what avail will it now be that the Constitution of the United States has declared that slavery shall not exist, if in the late slaveholding

(continued)

v. McCrary, 427 U.S. 160 (1975), interpreting *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409 (1968), held that:

> "The portion of § 1 of the Civil Rights Act of 1968 presently codified as 42 U.S.C. § 1982 [42 U.S.C.S. § 1982] prohibits private racial discrimination in the sale or rental of real or personal property. Relying on the legislative history of § 1, from which both § 1981 and § 1982 derive, the Court concluded that Congress intended to prohibit "all racial discrimination, private and public, in the sale . . . of property," 392 U.S., at 437. and that this prohibition was within Congress' power under § 2 of the Thirteenth Amendment "rationally to determine what are the badges and the incidents of slavery, and . . . to translate that determination into effective legislation." Id., at 427 U.S. at 170."

The Court held further in *Runyon v. McCrary,* again interpreting *Jones* and stated that:

> "The applicability of the holding in *Jones* to § 1981 was confirmed by this Court's decisions in *Tillman v. Wheaton-Haven Recreation Assn.,* 410 U.S. 431 (1973) and *Johnson v. Railway Express Agency,* 421 U.S. 454 (1975). In *Tillman* the petitioners urged that a private swimming club had violated 42 U.S.C. § § 1981, 1982, and 2000a et. seq. [42 U.S.C.S. § § 1981, 1982, and 2000 a et. seq.], by enforcing a guest policy that discriminated against Negroes. The

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(footnote continued from preceding page)

States laws are to be enacted and enforced depriving persons of African descent of privileges which are essential to freemen?

It is the intention of this bill to secure those rights.

36 CONG. GLOBE 474 (1866). The fundamental character of the rights in question is apparent in light of the attacks levelled by Senator Davis. He contended that "the whole subject of free Negroes and of slave Negroes" was constitutionally the province of the states. *Id.* at 530. He stated that "[t]his is a Government and a political organization by white people. It is a principle of that Government and that organization before and below the Constitution, that nobody but white people are or can be parties to it." *Id.* He contended that the power to amend the Constitution did not include within it the "power to revolutionize," to "subvert" and to "change our form of Government" by making Negroes citizens.

> Court noted that "[t]he operative language of both § 1981 and § 1982 is traceable to the Act of April 9, 1866, c 31, § 1, 14 Stat 27." 410 U.S. at 439. Referring to its earlier rejection of the respondents' contention that Wheaton-Haven was exempt from § 1982 under the private-club exception of the Civil Rights Act of 1964, the Court concluded: "In light of the historical interrelationship between § 1981 and § 1982 [there is] no reason to construe these sections differently when applied, on these facts, to the claim of Wheaton-Haven that it is a private club." 427 U.S. at 171."

This Court should interpret § 1982 in light of the altered circumstances and use a broad reading to reach vestiges of slavery from whatever source they derive. There can be no doubt that the Reconstruction Congress was concerned with the eradication of the badges and incidents of slavery. The forms have changed but the problems remain and this Court, as final arbiter of citizens' rights, should not subvert the plain meaning of the statute and its remedial effects.

This Court breathed new life into § 1982 in *Jones, supra.* Now, this Court is being asked to throw up a shield that would no doubt leave many violations of rights unremedied. This obstruction takes the form of an evidentiary method which requires intent and/or purpose to discriminate before one can prove his case under § 1982. In *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971), this Court expanded the deprivation of rights that could be traced to slavery. The holding that poor performance by Blacks on standardized intelligence tests and the lower percentile of Blacks with high school diplomas[4] can be linked to slavery and its pernicious after-effects on the educational opportunities available to Blacks[5] was indeed a correct decision and it raised the legitimate aspirations of the Black and poor in this country.

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[4]401 U.S. at 425-426.

[5]*Id.* at 430.

This concept was judicially engrafted into the act as an evidentiary method of achieving the purpose of Congress - which was to eliminate the "artificial, arbitrary and unnecessary" barriers of employment.[6] Clearly, there is no reason this same approach should not be used to effectuate the congressional purpose underlying Section 1982. After all, universal freedom in these United States has not been achieved as of this date.

Respondent is aware of this Court's decision in *Washington v. Davis,* 426 U.S. 229 (1976); *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977); *Personnel Administrator of Massachusetts v. Feeney,* 442 U.S. 256 (1979) and *City of Mobile v. Bolden,* 100 S.Ct. 1490 (1980), but believes that this Court need not decide the issue of purpose and/or intent in this case. This is so because the 13th Amendment has had a limited construction and thus, the concerns expressed by this Court that "application of a disproportionate impact standard under the Equal Protection Clause would be far reaching and would raise serious questions about and perhaps invalidate a whole range of tax, welfare, public service, regulatory and licensing statutes"[7] should be balanced with the need to eradicate the vestiges of slavery that still exist in this country. Many practices that carry forth the vestiges of slavery are not intentionally designed, but the critical focus should be on the effect of the act complained of, not the motive of the actor. This Court should look to the act complained of to see whether it adversely prejudices a discrete group of people in the enjoyment of important rights without sufficient legitimate justification. This means that the Court should take into consideration the relative position

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[6]401 U.S. at 431.

[7]426 U.S. 229, 248 (1976).

of the affected group, which will often determine the degree and the kind of injury that results from the particular action. This approach is consistent with the "totality of the circumstances"[8] articulated in *Washington v. Davis, supra.*

In the instant case, there was a street closing that not only affected Black pedestrians and vehicular access to West Drive, to Overton Park and to a public school but it did more. The closing inhibited Blacks fom holding their property equal to whites. Moreover, the closure denied Blacks their right to uphold their property in the same manner as whites. Obviously, if a white person buys property in Hein Park, he will have direct access to Overton Park and the public school. If a Black person buys property across the street he would not have direct access and could not enjoy the same rights, privileges and amenities as whites because the barricade inhibits his access. If one took into consideration the passing of the resolution by the municipality above, one might be able to conclude that the action was constitutionally permissible. Nevertheless, when one views the whole sequence of events, it becomes apparent that the action of the municipality cannot withstand judicial review.

This Court should affirm the Appellate Court's opinion and not reach the question of intent and/or purpose because this case can be decided without breaking new ground. In the alternative, this Court should, at a minimum, issue a remand on the pendent state court claims and the "due process and equal protection" claims.

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[8]Discriminatory intent could be inferred from the grossly disproportionate impact of official actions; the historical background of the decision, "particularly if it reveals a series of official actions taken for inviduous purposes"; "the specific sequence of events leading up to the challenged action," particularly departures from substantive and procedural norms; and legislative or administrative history, "especially where there are contemporary statements by members of the decision-making body, minutes of its meetings or reports." 426 U.S. at 266-68.

ARGUMENT

INTRODUCTION

Petitioners are attempting to have this Court to reverse a decision of the Appellate Court regarding a street closing in Memphis, Tennessee. They would have this Court believe this action was "a municipality's exercise of its police powers in closing this street to through traffic in order to achieve a residential area permissible goals of reducing the flow of traffic, enhancing safety and reducing noise and litter." (Pet. Br. at 4). In order for the Court to gain more appreciation for this case, the Court need not look any further than its decision in *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402 (1971). In that case this Court said:

> "Overton Park is a 342-acre city park located near the center of Memphis. The park contains a zoo, a nine-hole municipal golf course, an outdoor theater, nature trails, a bridle path, an art academy, picnic areas, and 170 acres of forest. The proposed highway, which is to be a six-lane, high-speed, expressway, will sever the zoo from the rest of the park. Although the roadway will be depressed below ground level except where it crosses a small creek, 26 acres of the park will be destroyed." 401 U.S. at 406.

Overton Park is a very beautiful park with various facilities, open for all to enjoy. Among the public facilities in Overton Park are:

(a) *The Shell* - an outdoor stadium that seats hundreds of persons. All types of performers and artist perform there and many of the performances at the Shell are free to the public.

(b) *The Children's Playground* - a playground for children with different kinds of children's swings, monkey bars, slides, iron horses and many other attractions.

(c) *The Overton Park Zoo* - one of the largest facilities of its kind in this region.

(d) *The Aquarium* - is an extension of the Zoo which houses among other aquatic life, snakes and other species of animals.

(e) *Brooks Memorial Art Gallery* - is an art gallery located in Overton Park.

(f) *The Memphis Arts Academy* - is another facility which is housed in Overton Park.

(g) *The Golf Course* - is a nine-hole facility which is located in Overton Park.

(h) *Softball Fields* - are located in Overton Park.

(i) *Children's Wading Pool* - is a wading pool in Overton Park which is adjacent to the children's playground.

The above-mentioned items are only a few attractions located in a vast green haven called Overton Park. In the *Overton Park* case the Court said:

> "The Secretary of Transportation completely failed to comply with the duty imposed upon him by Congress not to permit a federally financed public highway to run through a public park "unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park . . . That congressional command shall not be taken lightly by the Secretary or by this Court. It represents a solemn determination of the highest law-making body of this nation that the beauty and health-giving facilities of our parks not to be taken away for public roads without hearings, factfindings, and policy determinations under the supervision of a cabinet officer - the Secretary of Transportation. (J. Black and Brennan Separate Opinion). 401 U.S. at 421."

Contrary to the contentions of Petitioners, this case is not an ordinary land use case. This case concerns itself with, among other things, access of Black youth and others to

Overton Park and Snowden Public School. Petitioners' brief is silent on the issue of Overton Park and Snowden School for several reasons. Historically, the residents of Hein Park and the City of Memphis have attempted to keep Blacks from enjoying Overton Park. (A. 12-15, 154; Tr. Ex. 1 & 2). Moreover, the City has actively participated in this scheme by enforcing its sidewalk laws against other residents but not the Hein park residents and failing to afford the effected area residents substantial and procedural due process in the street closing. (Res. Br., pp. 3-9 herein).

This case is similar to *Jennings v. Patterson,* 488 F.2d 436 (1974), where a barricade was erected by two private defendants, which Defendants City of Dadeville, Alabama and its government officers failed to remove. In reversing the District Court's decision, the Court stated:

> "Yet it was shown at trial that, with one exception, all of the persons directly affected by the Patterson's barricade were black. The only white person affected, Shaddix, was offered private access to the closed street. And the jury found that the defendants had knowingly deprived these persons of the right to use the street. Clearly, these persons, because they are black, have been denied the right to hold and enjoy their property on the same basis as white citizens. *See Jones v. Mayer Co.,* 392 U.S. 409 (1968). 488 at 442.

It should be noted that the Court, in *Jennings,* stated quite clearly that "the construction of the barricade was a deprivation of the rights secured to them (Blacks) under 42 U.S.C. §1982 and the denial of convenient access to downtown Dadeville was an injury to plaintiffs' property." Here, the same rationale applies and this Court should affirm the Court of Appeals' decision. The discrimination in this case is as stark as it was in *Hawkins v. Shaw,* 437 F.2d 1286 (1971) where the Court said "the Town of Shaw, indeed any town, is not immune to the mandates of the Constitution."

The Fifth Circuit stated in a per curiam opinion in Shaw II:

> "Moreover, in our judgment the facts before us squarely and certainly support the reasonable and logical inference that there was here neglect involving clear overtones of racial discrimination in the administration of governmental affairs of the town of Shaw resulting in the same evils which characterize an intentional and purposeful disregard of the principle of equal protection of the laws. *See Yick Wo v. Hopkins,* 118 U.S. 356 (1886); *Loving v. Virginia,* 388 U.S. 1, 10 (1966); *Snowden v. Hughes,* 321 U.S. 1, 8; *Kennedy Park Homes Association, Inc. v. City of Lackawanna,* 436 F.2d 108 (1971); *Rodriquez v. Brown,* 5 Cir. 1970, 429 F.2d 269, 273; *Norwalk CORE v. Norwalk Redevelopment Agency, supra* 395 F.2d 931."
>
> Federal Courts are reluctant to enter the field of local government operations. The conduct of municipal affairs is "an extremely awkward vehicle to manage." It is apparent from our original opinion, and we repeat here, that we do not imply or suggest that every disparity of services between citizens of a town or city creates a right of access to the federal courts for redress. We deal only with the town of Shaw, Mississippi, and the facts as developed in this record."

Here, we are only dealing with the City of Memphis, Tennessee and the street closing and we respectfully request the Court to distinguish and limit this case to the facts herein and affirm the decision below.

THE CIVIL RIGHTS ACT OF 1866 AND THE STANDARD THAT SHOULD BE USED BY THIS COURT

In *Jones, supra,* the Supreme Court took judicial notice of the Fair Housing Act, (Title VIII of the Civil Rights Act of 1968)[9] passage. This Court said that "1982 contained none

[9]42 U.S.C. 3601-3619 (1970).

of the exemptions that Congress excluded in the Civil Rights Act of 1968." Indeed, the Court made clear that the rights created by 1982 are independent of and not limited by the passage of the more detailed provisions of Title VII and Title VIII.[10]

Professor Robert G. Schwemm, in his article "Discriminatory Effect and the Fair Housing Act", 54 Notre Dame Lawyer 199 (1978) urges a standard for 1982 that tracks the yet developed standard of the Housing Act of 1968 (Title VIII). Respondent urges this Court to accept this standard. Professor Schwemm states:

> "These differences in Title VIII and § 1982 make it at least conceivable that the standard of proof under the two statutes could also vary. As in the case of Title VIII, there would seem to be three possible standards under § 1982: (1) discriminatory purpose, as required for equal protection claims by *Washington v. Davis*; (2) unjustified discriminatory effect, as applied to title VII cases by *Griggs;* and (3) something else, perhaps an intermediate standard.
>
> For its part, the Supreme Court has yet to declare whether a showing of discriminatory effect would be sufficient to establish a § 1982 violation. The Court's modern § 1982 cases have all dealt with intentional discrimination,[11] and it has not had occasion to comment on the proper standard in an effect case under the old law.[12] There is a clue, however, in *Washington v. Davis*.[13] There, the Court applied the *Griggs* standards to a § 1981 claim, albeit an unsuccessful one.[14] Since the Court has elsewhere indicated that

[10]392 U.S. at 416-17 n. 2.

[11]*See* 410 U.S. 431; 396 U.S. 229; 392 U.S. 409.

[12]Justice Stewart's opinion in *Jones* did state that § 1982 "must encompass every racially motivated refusal to sell or rent" (392 U.S. at 421-22), but nothing was said about practices with discriminatory effects that were not racially motivated. *See* note 172 *supra*.

[13]426 U.S. 229 (1976).

[14]*Id.* at 248-52.

§1981 and §1982 should be interpreted in a like manner,[15] *Davis* suggests that the proper standard under §1982 should also be derived from *Griggs*.

Perhaps the strongest argument in favor of an effect test for §1982 cases is that clarity and simplicity would best be served if the same standard applied in similar suits under Title VIII and §1982. (This argument, of course, presupposes that *Griggs* is ultimately extended to Title VIII.) The overlapping relationship of the two statutes is confusing enough without having two different standards apply in a given type of housing discrimination case. Admittedly, the desire to avoid conflicting guidelines did not prevent the Supreme Court from developing a two-standard approach in *Davis*, but the rationale for that approach—that it is up to Congress to provide for a more rigorous standard than the constitutional one of purposeful discrimination—does not apply when the comparison is between two statutes. Here, the question simply becomes a matter of congressional intent.

Doubtless the Congress that passed the 1866 law was primarily concerned with the most egregious forms of intentional discrimination and never even considered the purpose-or-effect issue.[16] Nevertheless, it is clear that the Reconstruction Congress sought to establish "a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves."[17] The Civil Rights Act of 1866 was intended to abolish the "badges and incidents of slavery."[18] In *Jones*, the Supreme Court held that private racial discrimination in housing is one

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[15]*See* 427 U.S. at 171-72; 410 U.S. at 439-40. *See also id.* at 190 (Stevens, J., concurring); [I]t would be most incongruous to give these two sections a fundamentally different construction.

[16]*See* Note, *Racially Disproportionate Impact of Racially Neutral Practices - What Approach Under 42 U.S.C. Sections 1981 and 1982?*, 1977 Duke L.J. 1267, 1278-80 (1977).

[17]427 U.S. at 296. *See also* Note, *supra* note 238, at 1278, 1284-87.

[18]392 U.S. at 439-41; *See* Civil Rights Cases, 109 U.S. 3, 20-22 (1883).

of the badges and incidents of slavery intended to be eradicated by § 1982.[19] After *Jones,* it is not a big step to conclude that a housing practice that has the effect of discriminating against blacks "too is a relic of slavery."[20]

The Supreme Court has already held that the congression concerns underlying § 1982 were similar to those that gave rise to the Fair Housing Act. For example, Title VIII was intended "to replace the ghettos by truly integrated and balanced living patterns,"[21] while § 1982 was concerned with "racial discrimination [that] herds men into ghettos and makes their ability to buy property turn on the color of their skin. . ."[22] The Court has also noted that a "narrow construction of the language of § 1982 would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded" by it,[23] while describing the language of Title VIII as "broad and inclusive" and entitled to a "generous construction."[24]

An argument might be made that the Fair Housing Act should be governed by a more rigorous standard than § 1982, because exemptions and limitations in the newer law reflect a congressional desire to apply a more lenient test in those cases excluded from its coverage. There are two problems with this argument. First, its rationale would also justify reading the Title VIII limitations into § 1982, which the courts have already held to be inappropriate. Second, an effect standard would probably not be of much practical significance unless Title VIII also applied. A § 1982 case against an individual homeowner or small landlord who is not covered by Title VIII[25] would almost surely have to be

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[19]392 U.S. at 438-41.

[20]*Id.* at 443.

[21]409 U.S. at 211 (quoting 114 CONG. REC. 2706, 3422 (1968)).

[22]392 U.S. at 442-43.

[23]396 U.S. at 238.

[24]246 U.S. at 209, 212.

[25]*See* 42 U.S.C. § 3603(b) (1970).

based on purposeful discrimination, not just effect, because proving discriminatory effect requires a large defendant who has made a sufficient number of decisions to establish a statistically significant pattern. Similarly, the greater availability of punitive damages under § 1982 would be relevant only in cases where racial intent is shown. Thus, it is unlikely that applying a discriminatory effect standard to § 1982 as well as to the Fair Housing Act would result in imposing liability on any defendant who would not also be held liable under Title VIII.

Before the Supreme Court decided *Davis*, the lower courts certainly made no attempt to devise or apply a different standard of proof under § 1982 than under Title VIII. No distinction was made between the two in suits brought under both statutes,[26] and where § 1982 alone was involved, it was held to proscribe more than just intentional discrimination.[27]

After *Davis*, however, there have been a number of lower court decisions distinguishing between the Title VIII and § 1982 standards and indicating that proof of racial intent is required in a § 1982 case.[28] Most of these decisions simply assume that the old statute must be governed by *Davis'* interpretation of the equal protection standard, which is rather surprising since § 1982 was not enacted pursuant to the Fourteenth Amendment[29] and since *Davis* itself shows that suits against government defendants are to be judged by a more rigorous standard under § 1981 than under the

[26] *See, e.g.*, 499 F.2d 819; *Johnson v. Jerry Pals Real Estate*, 485 F.2d 528 (7th Cir. 1973); *Williamson v. Hampton Management Co.*, 339 F. Supp. 1146 (N.D. Ill. 1972).

[27] *See, e.g., Clark v. Universal Builders, Inc.*, 501 F.2d 324 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974). *But see McCrary v. Runyon*, 515 F.2d 1082, 1088 (4th Cir. 1975) (en banc), *aff'd*, 427 U.S. 160 (1976).

[28] *E.g.*, 429 F. Supp. at 1385; 425 F. Supp. at 1024; *cf. Ortega v. Merit Ins. Co.*, 433 F. Supp. 135, 143 n.4 (N.D. Ill. 1977); cases cited at Note, *supra* note 238, at 1280 n.76.

[29] 392 U.S. 409.

> Equal Protection Clause. These courts have also failed to analyze the legislative history or congressional purposes behind § 1982, which, as shown above, could well support an effect test in § 1982 cases.[30] Thus, their conclusion that purposeful discrimination is required under § 1982 is not based on a proper analysis of the statute and is therefore unlikely to be the final word on the matter."[31]

It has been stated by some scholars that:

> "The use of the disproportionate impact standard for sections 1981 and 1982 is permissible under the broad language of those statutes and is desirable as a method of effectuating the underlying congressional purpose. In those cases dealing with matters outside of the employment area the courts will have to alter the *Griggs* job relatedness defense to fit the particular situation. The defendant's burden in these instances should be to prove that the challenged practice is reasonably necessary for the achievement of legitimate, non-discriminatory purpose."[32]

Respondent Greene urges this Court to defer ruling on the standard at this time until a sufficient body of law is developed in the housing area. The Court should consider a case-by-case approach to 1982. If the 13th Amendment is to be what its originators wished it to be, it should be flexible in its application. To define, it at this time is to limit its operation. The amendment should be allowed to grow until universal freedom is achieved in this country. In the

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[30]*See* Note, *supra* note 238, at 1278, 1282, 1285-87.

[31]*See* Note, *supra* note 238, at 1269, 1280-84, 1288; *cf.* Note, Section 1981 and the Thirteenth Amendment After *Runyon v. McCrary - On the Doorsteps of Discriminatory Private Clubs,* 29 Stan. L. Rev. 747, 772 (1977).

[32]Racially Disproportionate Impact of Racially Neutral Practices - What approach under 42 U.S.C. Sections 1981 and 1982? 1977 Duke L.J. 1267.

meantime, this Court could and we urge that it look and see "whose ox is gored when assessing legislation or other official action under the Equal Protection Clause, if this approach is to be adopted."

As Judge Skelly Wright states, "To accurately judge effect, we must know who is the victim and to what class he belongs. The obvious fact is that the same conduct will have very different consequences depending on which group is adversely affected."[33]

A SENSITIVE INQUIRY INTO THE FACTS OF THIS CASE MANDATES AFFIRMANCE

Justice Stevens, concurring in *Washington, supra,* noted that the burden of proving discriminatory intent involves different evidentiary considerations depending on the context in which the alleged discrimination arises.[34]

The specific circumstances in which evidence of discriminatory effect is sufficient to establish an equal protection violation without direct evidence of discriminatory intent has not been clearly defined. We urge this Court to accept this case as a classic example of inferred discriminatory intent. There was both direct and circumstantial evidence introduced in this case. In *Arlington Heights, supra,* the Court further explained *Washington v. Davis* by stating that:

> "*Davis* did not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes.
>
> Rarely can it be said that a legislative or administrative body operating under a broad mandate made a decision

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[33]J. Skelly Wright, Judicial Review and the Equal Protection Clause, 1980 Harvard Civil Rights L.R. Vol. 15, No. 1.

[34]426 U.S. at 253 (Steven, J. concurring).

> motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from viewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified." 429 U.S. at 265-266.

Respondents showed that the impact of the street closing fell more heavily on Blacks than whites. Respondents showed that a clear pattern, unexplainable on grounds other than race, emerged from the City of Memphis' action in historically not enforcing the sidewalk law against the Hein Park all-white residents while enforcing it against other residents including Mr. Calvin Woods. (A. 13-15).

Historically, Hein Park was developed well before World War II as an exclusive residential neighborhood for white citizens and these characteristics have been maintained as the trial judge so found. (We request this Court to interpret maintained to mean by the City of Memphis). The specific sequence of events leading up to the challenged decision was revealed in the cloak of secrecy surrounding the proposed closure, the lack of public hearings as such, the due process issues regarding notice, opportuntiy to be heard and the refusal to reopen the street closure issue by the City Council. Departure from the normal procedural sequence is glaring since the interpretation of abutting landowners was changed, the requirement of 100% approval was altered, alternative methods of reaching the same results were not seriously considered and no official survey was made as to the impact of the closing and/or whether closing was warranted under the circumstances stated by Hein Park residents. It should be noted in this regard that "what were official files and what

were not official files became an issue." (A. 156). Finally, Black residents were required to sign the 1968 and 1972 application of Benton and Ruth Streets. (1. 158).

The administrative and legislative history shows clearly that all Black Councilmen and several whites were opposed to the closing.[35]

The sensitive inquiry shows clear that the street closing perpetuated the all-white nature of Hein Park. The undesirable traffic did not pertain to vehicular traffic. This street closing was the first major street closing in the history of Memphis. Even assuming that the initial attempt to utilize procedures prescribed by law for closing a street does not in and of itself constitute circumstantial proof of racial bias, the inquiry does not stop there. Obviously, the same procedures applicable to unused streets and alleys cannot be used for a major thoroughfare. Moreover, when one looks at the due process, both substantively and procedurally, the inference is unescapable. Discrimination was the motive, purpose and reason for its use. There is no way in the world that this matter would have happened if the Springdale area was predominently white.

Respondent urges this Court to look at the totality of the circumstances in making its determination on the issue.

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[35]It should be noted that Councilman Bob James, whose district includes Hein Park, stated at the January 29, 1974 hearing that the closing of West Drive was wrong and unconstitutional. (Tr. Ex. 1 & 2; Tr. 1). Counsel herein requests this Court to allow errata or strict proof on this point at a later date. Counsel herein is representing an informa pauperis client and entered this case at the Appellate Court level after the briefs were submitted. The agreed upon Appendix does not contain the City Councilman's transcript but it is Counsel's understanding that the said transcript is a part of this record; Rule 17, 26 and 29(3); Stern & Grossman *Supreme Court Practice,* p. 658; (Record before Supreme Court is entire record below).

AFFIRMANCE OF THE APPELLATE COURT DECISION IS WARRANTED

The Court of Appeals followed the dictates of this Court in *Jones* and reversed the District Court. In doing so, the Court stated that the District Court relied too heavily on *Palmer v. Thompson,* 403 U.S. 217 (1971). On remand, the District Court compared the benefits of street and alley closing between Black and white citizens. The District Court's findings of fact compels affirmance. This Court, by viewing each of the factors relied upon below, strongly supports affirmance. It is apparent on this record that the City of Memphis fostered a policy of racial isolation as between the residents of Hein Park and the residents north of Hein Park.

As this Court said in *Runyon, supra*:

> "In these circumstances there is no basis for deviating from the well-settled principles of stare decisis applicable to this Court's construction of federal statutes." 427 U.S. at 175.

If this Court meant in *Jones, supra* what it said, "A dollar in the hands of a Black will purchase the same thing as a dollar in the hands of a white man" then affirmance is mandated. Clearly, if the right is to uphold property, the value of which was greatly depressed by the closing of West Drive, that right was violated by the City. The decision of the City Planning Commission to interpret the policy differently warrants reversal. This Court has stated on many occasions that:

> "Rent decisions by the administration inconsistent with that under review are relevant as to whether the statutory standard has been followed." *NLRB v. Metropolitan Life Ins. Co.,* 380 U.S. 483 (19).

The administrative decision was wrong and racially motivated but citizens could not get an audience with the appropriate decision-makers prior to the decision because no notice was given to them regarding the closing. Nevertheless, this Court makes clear that:

> "One attacking an administrative decision must be given an opportunity to meet the evidence relied upon by the administrator." *Gonzales v. U.S.*, 348 U.S. 407.

This record was never presented to Respondent nor was there a hearing "at a meaningful time and in a meaningful manner" ever held. *Armstrong v. Manzo,* 380 U.S. 545 (1965).

We respectfully request affirmance.

THE CONSTITUTIONAL ISSUE OF INTENT AND PURPOSE TO ESTABLISH A VIOLATION OF 1982 NEED NOT BE REACHED

It is not necessary for this Court to render a decision on the question - whether a violation of 1982 and the Thirteenth Amendment can be established without a showing of racially discriminating intent or purpose. The evidence in the record shows clearly that this must be saved for another day. Justice Brandeis in *Ashwander v. TVA,* 297 U.S. 288 (1936) (concurring opinion) stated long ago that:

> "The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision. They are . . .
>
> The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it'. . . .

> The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied'. . . .
>
> The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction of general law, the Court will decide only the latter. . . ."

We request that this Court follow the prescription of Justice Brandeis and decline the invitation to rule on the issue of intent or purpose to discriminate.

ARGUMENTS OF PETITIONERS

Respondent has reviewed the Brief of Petitioners and believes that it states an abundance of law but few facts in which the law will support.

County Board of Arlington v. Richards, 434 U.S. 5 (1977) is in opposition for among other reasons, it did not involve discrimination under 1982. Moreover, it was a per curiam opinion that they decided the issue in that particular case. While there is a split in authority as to what weight the various circuits credit summary affirmances, it cannot be doubted that the decision has very little precedential significance in this case. One last comment on Petitioners' position is in order. On p. 13, Petitioners state:

> "While there might be a finding that the action of the City Council has a disproportionate impact on certain black citizens, which is debatable, the impact was certainly not so stark as to be found unexplainable on grounds other than race."

This construction of the disproportionate impact theory stretching reason beyond the subliminal. Black people were told in umistakable terms to stay out of Hein Park. This Court in *Feeney, supra* stated:

> "Actions of the accused are set in time and place in many relationships. Environment illuminates the meaning of acts, as context does that of words. What man is up to may be clear from considering his bare acts by themselves; often it is made clear when we know the reciprocity and sequence of his acts with those of others, the interchange between him and another, the give and take of the situation." *Cramer v. United States,* 325 U.S. 1, 32-33 (1945).

There can be no doubt about the racial feeling of Hein Park residents regarding Black people using "their street."

Surely, a vote on the issue would not have helped the Black residents. But as this Court has stated:

> "A citizen's constitutional right can hardly be infringed simply because a majority of the people choose that it be." *Lucas v. Colorado General Assembly.* 377 U.S. 713, 736, 737 (1964).

CONCLUSION

For all of the foregoing reasons stated herein, we respectfully request affirmance in this cause.

Respectfully submitted,

/s/ ALVIN O. CHAMBLISS
National Conference of Black Lawyers
3322 South Lamar Blvd.
Oxford, MS 38655
601/234-2918